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# In the Supreme Court of the United States.

OCTOBER TERM, 1976

No. 76-1500

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief for the Petitioner

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## Table of Contents.


| | |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statute involved | 2 |
| Questions presented for review | 3 |
| Statement of the case | 4 |
| Summary of argument | 6 |
| Argument | 8 |
| I. Introduction: The statutory background. | 8 |
| II. Since the doctrine of intergovernmental tax immunity contains no exception for "user charges," the circuit court erred in refusing to apply the doctrine in this case. | 14 |
| III. Assuming arguendo that a "user charge" falls outside the scope of the tax immunity doctrine, the Commonwealth's State Police helicopter should nonetheless be immune from taxation because the aircraft registration tax is not a "user charge." | 28 |
| A. The registration tax cannot be classified as a "user charge" under the proper definition of that term. | 28 |
| B. The Secretary of Transportation, charged by Congress with reviewing the provisions of the Revenue Act, has rejected the "user" characterization of the aircraft registration tax as unsound. | 38 |
| IV. Contrary to the argument of the United States in the lower courts, the principle of intergovernmental tax immunity remains alive and well. | 41 |
| Conclusion | 54 |

## Table of Authorities Cited.

### CASES.

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U.S. 495 (1947) 33
Alabama v. King & Boozer, 314 U.S. 1 (1941) 46
Allen v. Regents, 304 U.S. 439 (1938) 17n, 47n
Ambrosini v. United States, 187 U.S. 1 (1902) 17n, 19n
Arnett v. Kennedy, 416 U.S. 134 (1974) 50n
Board of Trustees v. United States, 289 U.S. 48 (1933) 22n
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 45
Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874) 31n
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 26n, 27n, 32, 33, 37
Chesapeake & Delaware Canal Company v. United States, 250 U.S. 123 (1919) 39
City of New York v. United States, 394 F. Supp. 641 (S.D. N.Y. 1975), aff'd per curiam, 538 F. 2d 308 (2d Cir.), cert. denied, 429 U.S. 825 (1976) 5, 23n, 24n, 52
Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 24, 25, 26n, 27n, 30, 36
Collector v. Day, 78 U.S. (11 Wall.) 113 (1870) 15, 16n, 43, 45n
Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) 25, 33n



Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) 32
Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72 (1939) 32n
Duckworth v. Arkansas, 314 U.S. 390 (1941) 32n
Educational Films Corp. of America v. Ward, 282 U.S. 379 (1931) 18n, 19n
Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972) 24, 26n, 27n, 30, 32n, 33, 36 et seq.
Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 22n
Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974) 35, 36, 37
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 22n, 37
Gillespie v. Oklahoma, 257 U.S. 501 (1922) 45
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 16n, 18n, 19n, 45n, 46, 50
Graves v. Texas Co., 298 U.S. 393 (1936) 45
Gurley v. Rhoden, 421 U.S. 200 (1975) 47
Head Money Cases, 112 U.S. 580 (1884) 21n, 22n, 24n
Helvering v. Gerhardt, 304 U.S. 405 (1938) 15, 17, 18, 19n, 23n, 44, 46 et seq.
Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938) 18n
Helvering v. Powers, 293 U.S. 214 (1934) 16n, 17n, 47
Helvering v. Therrell, 303 U.S. 218 (1938) 16n
Hendrick v. Maryland, 235 U.S. 610 (1915) 32
Huse v. Glover, 119 U.S. 543 (1886) 25n
Indian Motocycle Co. v. United States, 283 U.S. 570 (1931) 15, 17n, 19n, 44, 53

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 18n, 19n, 46
Kent v. Dulles, 357 U.S. 116 (1958) 37
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 47
Maryland v. Wirtz, 392 U.S. 183 (1968) 53
Massachusetts v. United States, 548 F. 2d 33 (1st Cir. 1977) 1, 14, 21, 22n, 31n, 41
Mayo v. United States, 319 U.S. 441 (1943) 17n, 19n, 27n
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 15, 21n, 33, 42, 43
Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 16n, 18n, 19n, 46
Morf v. Bingaman, 298 U.S. 407 (1936) 31, 32
Murdock v. Pennsylvania, 319 U.S. 105 (1943) 20, 34n
National Cable Television Association v. United States, 415 U.S. 336 (1974) 34, 35, 36, 37, 41
National League of Cities v. Usery, 426 U.S. 833 (1976) 20n, 21n, 52, 53
New York v. United States, 326 U.S. 572 (1946) 17, 19n, 20, 21n, 22n, 24n, 49 et seq.
New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937) 45
Ohio v. Helvering, 292 U.S. 360 (1934) 17n, 19n, 48n, 49
Packet Co. v. Keokuk, 95 U.S. 80 (1877) 24, 25, 30
Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928) 45
Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) 17n, 45
Sonzinsky v. United States, 300 U.S. 506 (1937) 28, 34
South Carolina v. United States, 199 U.S. 437 (1905) 16n, 17n, 48n, 49



State Board of Insurance v. Todd Shipyards Corp., 370 U.S. 451 (1962) 37
State of Georgia v. United States, No. 75-1155A (N.D. Ga. April 13, 1977) 6
State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942) 33
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 28, 34
Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 39n
Texas v. United States, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), aff'd, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973) 18n, 21, 22, 23, 24, 29n
Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 33n, 34n
Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466 (1934) 19n
United States v. California, 297 U.S. 175 (1936) 53
United States v. City of Detroit, 355 U.S. 466 (1958) 46
United States v. LaFranca, 282 U.S. 568 (1931) 34
United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1872) 17n
United States v. Sanchez, 340 U.S. 42 (1950) 28, 34
United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975) 34
Vicksburg v. Tobin, 100 U.S. 430 (1879) 24, 25, 30
Willcuts v. Bunn, 282 U.S. 216 (1931) 15, 16, 18, 44
Wilmette Park District v. Campbell, 338 U.S. 411 (1949) 17, 18, 19n

## Constitutional and Statutory Provisions

United States Constitution
Article I, § 8, cl. 1 14n, 34
Article I, § 8, cl. 3 (Commerce Clause) 15, 21n, 26, 27, 28, 32, 33 et seq.
Article I, § 10, cl. 3 (Duty on Tonnage Clause) 15, 25, 28, 30, 31n
Article III 34n
Tenth Amendment 43
Fourteenth Amendment 50n
United States Code, Title 28 (1970)
§ 1254(1) 2
§ 1346(a)(1) 4
United States Code, Title 49 (1970)
§ 1301(24) 30
§ 1348 30
§ 1701 10
§ 1702 10
§ 1703 38n
§ 1712 10
§§ 1713-1716 10
§ 1713 30n
§ 1713(b)(2) 10
§ 1714(c) 10n
§ 1717 30n
§ 1720 10
§ 1742 10, 36n
Internal Revenue Code
§ 4041 19n
§ 4041(c) 11, 35n
§ 4041(g) 13
§ 4071 39n



§ 4261 22, 29n, 35n
§ 4261(a) 11
§ 4261(c) 11
§ 4271 11, 35n
§ 4272 11
§ 4481 13
§ 4483(a) 13n
§ 4491 2, 4, 8, 9n, 11, 13, 14 et seq.
§ 4492(c) 30
§ 4492(a)(1) 9n
§ 6331(b) 34n
§ 7422 4
Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Title I, 84 Stat. 219, 49 U.S.C. §§ 1701 et seq. 9, 10, 11, 24n, 36n, 38, 39n
Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, Title II, 84 Stat. 236, I.R.C. § 4041 6, 9, 10, 11, 12, 13, 14 et seq.
§ 205, 84 Stat. 241 13
§ 206, 84 Stat. 242 9n
§ 209, 84 Stat. 252 38n
Natural Gas Act, 31 U.S.C. § 483a 35n
Act of June 29, 1956, c. 462, Title II, § 209, 70 Stat. 397 10n

## Miscellaneous.

Airport and Airway Cost Allocation Study, Part I: Determination, Allocation, and Recovery of System Costs (U.S. Department of Transportation, Sept. 1973) 39, 40
Federalist Papers, The (R. Fairfield ed. 1961) 20n, 42n

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## Brief for the Petitioner

## Opinions Below

The opinion of the United States District Court for the District of Massachusetts is not reported. The opinion of the United States Court of Appeals for the First Circuit is reported at 548 F. 2d 33.

## Jurisdiction

The judgment of the court of appeals was entered on January 28, 1977. The petition for a writ of certiorari was docketed on April 28, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Statute Involved

The constitutionality of I.R.C. § 4491 is involved. Said statute provides

**§ 4491. Imposition of tax.**

**(a) Imposition of tax.**

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of —

(1) $25, plus

(2)(A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3 1/2 cents a pound for each pound of the maximum certificated takeoff weight.

**(b) By whom paid.**

Except as provided in section 4493(a), the tax imposed by this section shall be paid —

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or



(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

**(c) Proration of tax.**

If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a)(2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

**(d) One tax liability per year.**

(1) In general.

To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) Cross reference.

For privilege of paying tax imposed by this section in installments, see section 6158.

**(e) Termination.**

On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

The text of the statute is found at page 6999 of volume 6 of the United States Code (1970).

## Questions Presented for Review

1. Whether the constitutional principle of intergovernmental tax immunity contains an exception for taxes

which are also designated as "user charges" or "user fees"?

2. Whether the federal excise tax on the use of civil aircraft can be appropriately designated as a "user charge" or "user fee"?

3. Whether the principle of intergovernmental tax immunity is presently valid and applicable to a direct tax on a State for the performance of a sovereign function?

## Statement of the Case

On September 23, 1975, the Commonwealth of Masssachusetts commenced a civil action for refund of the federal excise tax on the use of civil aircraft (I.R.C. § 4491) in the United States District Court for the District of Massachusetts (A. 1, 6-19). As required by I.R.C. § 7422 in such an action, the named defendant was the United States of America (A. 7). Jurisdiction was based on 28 U.S.C § 1346(a)(1) (A. 6). The basic claim was that the imposition of the tax on the Commonwealth was a violation of the constitutional principle of intergovernmental tax immunity (A. 9).

The complaint recited the facts upon which the claim of immunity was based. The aircraft use tax was imposed on the use by the Commonwealth of a helicopter for public safety purposes. The helicopter, during the taxable year July 1, 1970, through June 30, 1971, was operated by personnel of the Massachusetts State Police, a division of the Department of Public Safety. The helicopter was also registered with the Federal Aviation Administration (No. N1 484W) as a public use aircraft (A. 7). The complaint detailed the public safety uses:



> The state police helicopter is primarily used to promote highway safety. In the course of performing that function it serves as an airborne command post, effects emergency evacuations in cases of personal danger and provides transportation in medical emergencies. The helicopter is also used to promote other public safety functions such as assisting in searches for criminals and escapees from correctional facilities. (A. 7-8.)

The Commonwealth thus declined to pay the tax of $131.43 demanded by the Internal Revenue Service (A. 8).

On April 26, 1974, the Internal Revenue Service levied funds of the Commonwealth held by the First National Bank of Boston. The amount of $183 collected in this manner included the tax, interest and penalty for the period July 1, 1970 through June 30, 1971 (A. 8, 13-14). The Commonwealth filed a claim for a refund, which claim was disallowed on May 30, 1975 (A. 8, 18-19).

The United States filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (A. 19-20). The district court allowed the motion to dismiss (A. 2). At the hearing on the motion, the court briefly stated its reasons for that action (Pet. A.1-A.3). With respect to the claim of immunity from taxation, the court merely incorporated by reference the opinion in *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y. 1975), *aff'd per curiam*, 538 F. 2d 308 (2d Cir.), *cert. denied*, 429 U.S. 825 (1976). That opinion stated that prior decisions of this Court invalidating federal taxes on immunity grounds were "of but historical interest." 394 F. Supp. at 644. The district court also held that since the revenue from the tax was earmarked for the expansion of

the air transportation system, the tax was a user fee (Pet. A. 2). This point was not, however, expanded upon. The Commonwealth then appealed to the circuit court of appeals. The court affirmed the judgment of the district court but only on the user fee basis (Pet. A. 6). The court was of the view that the tax was permissible because "[t]he revenue raised by this charge is applied directly to benefit those who must pay the charge" (Pet. A. 8). The court did not, however, address the implications of the principle of intergovernmental tax immunity.

The Commonwealth then petitioned this Court for a writ of certiorari. The United States responded with a memorandum which stated that the immunity issue warranted plenary consideration by this Court. The articulated basis for this concurrence was the apparent conflict between the decision of the court of appeals and a decision sustaining a claim of immunity against the aircraft use tax in *State of Georgia* v. *United States*, No. 75-1155A (N.D. Ga. April 13, 1977). (Memorandum for the United States 7-8.) This court granted the petition (A. 22).

## Summary of Argument

1.

The federal excise tax on the use of civil aircraft is one of a series of taxing measures provided for in the Airport and Airway Revenue Act of 1970. The revenue derived from these measures is used to finance an ongoing system of airport planning and development grants. Massachusetts challenges the excise tax only as it is applied to the use of the State Police helicopter for public safety purposes.



2.

The federal government has enumerated powers and the states have reserved powers under our constitutional system of government. The principle of intergovernmental tax immunity is premised upon this foundation of dual sovereignty. Thus no one government is permitted to interfere with the performance of the other by imposing direct taxes upon the performance of a sovereign function. There is no recognized exception to this principle for taxes which are also designated as "user charges." The circuit court applied such an exception without directly addressing the implications of state sovereignty in any meaningful way. Rather, the circuit court made a summary comparison between the aircraft use tax and various charges adjudicated in other constitutional contexts. The cases dealing with duties on tonnage and undue burdens on interstate commerce relied upon by the circuit court do not govern or even illuminate the tax immunity issue squarely presented in this case.

3.

Were a "user charge" designation considered to have any bearing on the tax immunity issue, the aircraft use tax is not properly designated as a user charge. There is no direct correlation between the amount of the tax and the use of the navigable airspace or federally assisted airports. Since the issue presented is one of sovereignty, a rough approximation does not provide a sufficient basis for constitutional adjudication. The inappropriateness of the "user charge" designation is conclusively demonstrated by the Secretary of Transportation's determination, contained in a legislatively

mandated cost allocation study, that the aircraft use tax is unrelated to the amount of use of t[illegible]irway system.

4.

The principle of intergovernmental tax immunity has a solid constitutional foundation which has remained unshaken in the numerous opinions on the subject. There has, however, been some difficulty in its application to the plethora of tax contexts in which the issue has arisen. Thus the principle has occasionally been misapplied so as to immunize government employees and contractors doing business with the government. With respect to state immunity from federal taxation, the decision-making process has refined the principle so as to preclude a direct tax on the state for the performance of a sovereign function. The inescapable conclusion is that the federal excise tax on the use of civil aircraft may not be applied to the use of the State Police helicopter for public safety purposes.

## Argument

### I. Introduction: The Statutory Background

In this case the Commonwealth of Massachusetts challenges the application of a federal tax on the use of civil aircraft, I.R.C. § 4491,[1] to a helicopter owned by the

[1]Section 4491 reads in pertinent part:

(a) Imposition of tax.

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of —



Commonwealth and used by its State Police in performance of police duties. To provide the proper framework for consideration of the Commonwealth's challenge, there follows a brief overview of the statutory scheme of which these taxing provisions are a part.

In 1970 Congress passed two statutes designed to improve the nation's airport transportation system: the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219, 49 U.S.C. §§ 1701 *et seq.* (1970) ("the Development Act"); and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236, I.R.C. § 4041 (1970) ("the Revenue Act").[2] The stated purpose of the Development Act was to promote "substantial expansion

(1) $25, plus

(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of $2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3 1/2 cents a pound for each pound of maximum certificated takeoff weight.

(b) By whom paid.

Except as provided in section 4493(a) [concerning payments by lessees], the tax imposed by this section shall be paid —

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

The helicopter used by the State Police is a "taxable civil aircraft" within the meaning of I.R.C. § 4492(a) (1), namely, an "engine driven aircraft . . . registered . . . under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401 (a)) . . . ."

[2]The Development Act appears as Title I of Pub. L. No. 91-258; the Revenue Act is Title II. The aircraft use or registration tax at issue here, appearing in I.R.C. § 4491, was enacted as part of the Revenue Act, *see* Pub. L. No. 91-258, Tit. II, § 206, 84 Stat. 242 (1970).

and improvement of the airport and airway system . . . to meet the demands of interstate commerce, the postal service, and the national defense." 49 U.S.C. § 1701. To effect this purpose, the Act directed the Secretary of Transportation to formulate a national transportation policy, *id.*, § 1702, and prepare a national airport system plan, *id.*, § 1712. More specifically, it established an ongoing system of airport planning and development grants to be awarded by the Secretary of Transportation to applicant states, state agencies, or local governments according to distribution formulas set forth in the statute and based primarily on population and area. *See id.*, §§ 1713-1716.[3] The federal share of these airport development projects is generally limited to 50 per cent of the "allowable project costs" (also defined in the Act, *see id.*, § 1720); the federal share of the planning projects may extend to two-thirds of the project's cost. *Id.*, § 1713(b)(2).

The Revenue Act — of more direct relevance to this case — is designed to produce the funds necessary for financing and implementing the Development Act's provisions. *See* H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3082 (hereinafter cited as House Report). It respectively creates and increases several new and existing excise taxes, and establishes in addition an Airport and Airway Trust Fund[4] in which the tax monies are to be held. 49 U.S.C. § 1742.

[3]There is also provision for a more limited award of grants for "acquiring, establishing and improving air navigation facilities." 49 U.S.C. § 1714(c).

[4]The Airport Trust Fund is modeled after the long-established Highway Trust Fund. *See* Act of June 29, 1956, c. 462, Title II, § 209, 70 Stat. 397.



The specific tax measures included in the Revenue Act are the following: (1) an increase in the existing tax on commercial passenger tickets from five to eight per cent of the ticket amount, *see* I.R.C. § 4261(a); (2) a new international flight departure tax of $3 per passenger, *see id.*, § 4261(c); (3) a new tax of five per cent on air freight waybills, *see id.*, §§ 4271, 4272; (4) an increase in the existing aircraft gasoline tax to seven cents per gallon and a new tax of seven cents per gallon on other types of aviation fuel, *see id.*, § 4041(c); and (5) the new annual aircraft use or registration[5] tax of $25 per aircraft plus an additional amount based on the aircraft's weight, *see id.*, § 4491. The passenger and air freight taxes apply solely to commercial aircraft, while the gasoline and fuel taxes are imposed only on noncommercial aircraft. The registration tax in issue here is imposed on both commercial and noncommercial aircraft.

The legislation which became the Development and Revenue Acts was originally proposed as a package to Congress by the President. *See* House Report, *supra*, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 3047-48, 3082. However, once introduced in Congress, the package was split up. The airport planning and development portions of the original proposal, later to become the Development Act, were considered by the Committee on Interstate and Foreign Commerce of the House of Representatives. *See id.* at 3047, 3080-81. The original revenue portions, ultimately enacted in the Revenue Act, were

[5]Section 4491 imposes a tax on the "use" of any taxable civil aircraft. The Ways and Means Committee of the House of Representatives, which drafted this provision, consistently describes the measure as a "registration" tax. *See* H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3082, 3085. The terms are used interchangeably in this brief.

considered by the House Ways and Means Committee.[6] *Id.* The divergent paths which these measures followed in the House stemmed from their different characters and the distinct jurisdictions of the concerned House Committees. As recognized by both Committee chairmen, the Ways and Means Committee was required to handle the revenue provisions of the legislation "in accordance with its jurisdiction over tax matters," while provisions relating to expansion and improvement of the nation's airport system were properly within the Interstate and Foreign Commerce Committee's domain.[7]

In reporting on the Revenue Act provisions, the Ways and Means Committee characterized the various excise taxes included in the Revenue Act as "user taxes," intended generally to increase the share of airport development costs contributed by the air system's users. *See* House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3082, 3083. However, the only specific connection drawn by the Committee between this "user" concept and tax exemptions for state governments was directed not at the registration tax but at the commercial passenger tax; the Committee deleted the previously existing exemption granted governmental units from this tax. *See id.* at

[6]The President's proposed legislation included the commercial passenger and airfreight taxes and noncommercial gasoline and fuel taxes. It did not include the annual aircraft use tax. *See* Staff Report of Joint Committee on Internal Revenue Taxation, 91st Cong., 2d Sess., Summary of Recommendations on Air User Taxes 2 (Comm. Print 1970).

[7]Letter of Wilbur D. Mills, Chairman, Committee on Ways and Means, to Hon. Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, dated October 16, 1969, *included in* House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3081; *see* letter of Harley O. Staggers to Honorable Wilbur D. Mills, dated September 8, 1969, *included in id.* at 3080-81.



3090-3091. Congress accepted the deletion. Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, Title II, § 205, 84 Stat. 241 (1970). At the same time, the Committee, and later Congress, continued in effect the state government's exemption for the aircraft fuel tax. *See* I.R.C. § 4041 (g). As to the new aircraft registration tax, while neither the Committee nor ultimately Congress exempted state governments from its effect, the Committee's report never discussed the issue. Rather, its principal comments about the registration tax stressed that the tax was the only excise tax imposed on the air carriers themselves, and was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." House Report *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085. The Committee also described the aircraft use or registration tax as being similar in concept and operation to the highway use tax imposed under I.R.C. § 4481 on heavy trucks.[8] *See* House Report *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3082, 3092, 3094.

Of the several taxing provisions included in the Revenue Act, the only one which the Commonwealth challenges in this case is the application of the aircraft use or registration tax, I.R.C. § 4491.[9] It has consistently taken the position that, as applied to the helicopter used by the State Police, this tax violates the implied immunity of a state government from federal taxes which interfere with the state's exercise of its sovereign functions.

[8]Given this intended similarity between the highway use tax and the aircraft tax, it is noteworthy that Congress has exempted state and local governments from imposition of the highway tax. *See* I.R.C. § 4483(a).

[9]As noted above, see p. 13, *supra*, the Commonwealth is exempt from the fuel taxes included in the Revenue Act — the only other taxes applicable to noncommercial aircraft.

## II. Since the Doctrine of Intergovernmental Tax Immunity Contains No Exception for "User Charges," the Circuit Court Erred in Refusing to Apply the Doctrine in this Case.

The circuit court never reached the issue whether the aircraft use or registration tax established by the Revenue Act, I.R.C. § 4491, violated the principle of intergovernmental tax immunity as set forth by this Court. *Massachusetts* v. *United States*, 548 F. 2d 33, 35, 36 (1st Cir. 1977). While not disputing that the registration tax constituted an exercise of the Congress' taxing power,[10] the circuit court nevertheless determined that the tax immunity doctrine was not applicable because in its view the tax itself was in the nature of a "user charge" rather than a general tax, and, as such, outside the doctrine's scope. *Massachusetts* v. *United States*, *supra*, 548 F. 2d at 35-6.

The circuit court's analysis of the intergovernmental tax immunity doctrine was in error. It attempted to (1) carve out of the Internal Revenue Code a special category of taxes, to be known as user charges; (2) exempt such taxes from the principle disfavoring a direct federal tax on the

[10] As discussed more fully above, see pp. 11-13, *supra*, the legislative history of the tax plainly establishes art. I, § 8, cl. 1, of the Constitution as the underlying basis for the registration tax. The Revenue Act was considered by the House Ways and Means Committee, and not the Interstate and Foreign Commerce Committee, because it was recognized that only Ways and Means had jurisdiction over these taxing measures. H.R. Rep. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3080-81. Although the legislative report accompanying the Revenue Act occasionally characterized the registration tax as a user "charge" or "fee," *see id.* at 3085, the report's additional and repeated reference to it as a tax (*see id.* at 3082, 3085, 3092-94) suggests that Congress viewed a "user charge" merely as a specific type of tax. The placement of the registration tax statute in the Internal Revenue Code supports this conclusion.



property of state government used within the state's traditional and essential sphere of activity; and (3) support this new user charge exception to the intergovernmental immunity principle by reference to cases concerning tonnage duties and wharfage fees, as well as the Commerce Clause. This approach is without historical precedent or logical foundation. In the long line of cases considering the doctrine of intergovernmental tax immunity, this Court has not once referred to a Congressional exercise of the taxing power as a user charge or user tax, much less applied the term in its constitutional analysis. Nor has the Court ever introduced into its consideration of tax immunity questions the separate concerns and doctrines applicable to constitutional prohibitions on state tonnage duties, U.S. Const. art. I, § 10, cl. 3, or the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. An examination of the principles underlying the immunity doctrine and the contrasting concerns of the other constitutional provisions explains the reasons for the analytic path the Court has followed in the immunity field, and demonstrates the error of the circuit court's decision.

The principle of intergovernmental tax immunity sets forth the limitation or prohibition implicitly contained in the United States Constitution on the power of the state or national government to tax one another, or to tax the agencies, means, or instrumentalities which the other level of government employs to carry out its sovereign functions. *E.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819) (Marshall, C.J.) (instrumentalities of federal government immune from state taxes); *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 128 (1870) (state and its instrumentalities exempt from federal taxes); *see Helvering* v. *Gerhardt*, 304 U.S. 405, 411 (1938); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931); *Willcuts* v. *Bunn*, 282

U.S. 216, 224-25 (1931). The rule rests on the notion of sovereignty and the corollary need to protect from usurpation the integrity and independence of each of the two separate sovereignties in the federal system — the States and the United States. The dangers of intrusion are inherent in the fact that the taxing powers of the state and federal governments are operating within the same territorial limits. Nonetheless, each must be free to carry out its own sovereign functions in the appropriate sphere without undue interference from the other; the existence of unlimited authority in either the nation or the state (or both) to tax the other would necessarily prevent their essential coexistence.[11]

While the Court in its decisions has delineated firm boundaries on the reach of this immunity principle, to prevent immunity itself from thwarting the operation of dual federalism, these boundaries do not relate in any manner to the type or amount of tax at issue. The Court has long recognized that the state must have the freedom to perform its sovereign responsibilities without undue interference from the federal taxing power; however, the federal taxing power itself cannot be curtailed as to effectively impair its essential functioning.[12] In order to give structure to the necessary task of reconciling these competing interests in each case — and limit a state's claim of tax immunity to its proper function — the Court has developed two funda-

[11] *See, e.g., Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939); *Helvering* v. *Therrell*, 303 U.S. 218, 223 (1938); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523 (1926); *Collector* v. *Day*, *supra*, 78 U.S. (11 Wall.) at 125-27.

[12] *See Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 523-24; *Willcuts* v. *Bunn*, *supra*, 282 U.S. at 225; *Helvering* v. *Powers*, 293 U.S. 214, 225 (1934); *South Carolina* v. *United States*, 199 U.S. 437, 454-55, 463 (1905).



mental guidelines to determine whether the application of a tax to a particular governmental entity or person is constitutionally permissible.

The first guideline looks at "the nature of the function being performed by the state or in its behalf, exclud[ing] from the immunity activities thought not to be essential *to the preservation of state governments* even though the tax be collected from the state treasury." *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 419 (emphasis added). *See Wilmette Park District* v. *Campbell*, 338 U.S. 411, 419 (1949); *New York* v. *United States*, 326 U.S. 572, 590 (1946) (opinion of Stone, C.J.).[13] The second focuses on

[13] As discussed in Argument IV, *infra*, it is through application of this criterion that the Court has consistently held a state's conduct of commercial activities — indistinguishable from private analogues — to be outside the scope of the immunity doctrine and, accordingly, subject to a variety of federal taxes. *See, e.g., Allen* v. *Regents*, 304 U.S. 439, 449-53 (1938) (federal admissions tax on tickets to state university athletic contests); *Helvering* v. *Powers*, 293 U.S. 214, 227 (1934) (income tax on trustees of public railway); *Ohio* v. *Helvering*, 292 U.S. 360, 371 (1934) (excise tax on sellers of state-owned liquor); *South Carolina* v. *United States*, 199 U.S. 437, 463 (1905) (license tax on sellers of state-owned liquor); *see also New York* v. *United States*, *supra*, 326 U.S. at 575, 580-81, 582 (opinion of Frankfurter, J.); 584-85 (opinion of Rutledge, J.); 586 (opinion of Stone, C.J.) (tax on state's sale of mineral waters).

On the other hand, the Court has long affirmed the right of the states to carry on their essential sovereign functions unhindered by federal taxes. *See, e.g., United States* v. *Railroad Co.*, 84 U.S. (17 Wall.) 322, 333 (1872) (income from investments of a municipality not subject to federal tax); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 585-86 (1895) (private investor's income from state bonds exempt from federal tax to protect state's borrowing power); *Ambrosini* v. *United States*, 187 U.S. 1, 7-8 (1902) (federal stamp taxes may not be applied to bonds required under state liquor regulatory scheme); *Indian Motocycle Co.* v. *United States*, *supra*, 283 U.S. 570, 579 (federal sales tax may not be applied to sale of police equipment to municipality). *Cf. Mayo* v. *United States*, 319 U.S. 441, 447 (1943) (fertilizer used in federal farm program not subject to state inspection fees).

the identity of the taxpayer and its relationship to the state's sovereign interests: if the tax is imposed on an individual rather than the state or one of its agencies, thereby affecting the state only insofar as the taxpayer passes the actual tax burden on, immunity will ordinarily not be granted; the controlling factor is the legal incidence of the tax rather than its economic consequences. *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 419-20. *See Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. at 419; *Willcuts* v. *Bunn*, *supra*, 282 U.S. at 225.[14]

By their own terms these two criteria make no mention of "user charges" or of the general nature or amount of the tax at issue. Nor, as the cited cases make plain, does application of the criteria turn in any way on such considerations. On the contrary, the Court's tax immunity decisions affirmatively demonstrate that both the type of tax imposed[15] and

[14] Again, as further discussed in Argument IV, the Court has applied this criterion to deny immunity from income or other kinds of tax to state and federal employees, *see*, *Helvering* v. *Gerhardt*, *supra*, 304 U.S. 405; *Graves* v. *New York ex rel. O'Keefe*, *supra*, 306 U.S. 466; to contractors performing government contracts, *see e.g.*, *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 514; to corporations benefiting from film royalties, *see e.g.*, *Educational Films Corp. of America* v. *Ward*, 282 U.S. 379 (1931); to lessees of state lands receiving profits from oil and gas produced on the lands, *see e.g.*, *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); to sellers of government bonds receiving profits on the sale, *see Willcuts* v. *Bunn*, *supra*, 282 U.S. 214; to a park district for beach admissions taxes absorbed by the beach patrons, *see Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. 411.

[15] With the exception of the lower courts' decisions in the present case and *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973) (discussed below; see pp. 23-24, *infra*), no case concerning application of the intergovernmental tax immunity doctrine has been found which considered



its amount[16] are simply irrelevant to the question whether the tax immunity doctrine applies in a particular case.

the kind of tax — "user charge" or any other — to be a pertinent, much less controlling, factor. The wide variety of taxes which have been at issue in the immunity cases of the Court support this conclusion. *See*, *e.g.*, *Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. 411 (admission tax); *Mayo* v. *United States*, *supra*, 319 U.S. 441 (inspection fees); *New York* v. *United States*, *supra*, 328 U.S. 572 (sales tax); *Graves* v. *New York ex rel. O'Keefe*, *supra*, 306 U.S. 466 (state income tax); *Helvering* v. *Gerhardt*, *supra*, 304 U.S. 405 (federal income tax); *Educational Films Corp. of America* v. *Ward*, *supra*, 282 U.S. 379 (corporate franchise tax); *James* v. *Dravo Contracting Co.*, *supra*, 302 U.S. 134 (tax on gross receipts); *Trinityfarm Construction Co.* v. *Grosjean*, 291 U.S. 466 (1934) (gasoline excise tax); *Ohio* v. *Helvering*, *supra*, 292 U.S. 360 (flat exercise tax of $25 and $100 on retail and wholesale liquor dealers).

The similarity between the gasoline excise tax at issue in the *Trinityfarm* case and the aircraft gasoline tax established by the Revenue Act, *see* I.R.C. § 4041, is noteworthy. In addition, it is difficult to distinguish on substantive grounds the excise tax imposed on liquor dealers in *Ohio* v. *Helvering*, *supra*, from the annual aircraft use or registration tax at issue here. Yet neither of these two cases touched upon the "user charge" concept in the course of analysis.

[16] *See e.g.*, *Indian Motocycle Co.* v. *United States*, *supra*, 283 U.S. at 575 ("[w]here the principle [of intergovernmental tax immunity] applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute"); *accord*, *Trinityfarm Construction Co.* v. *Grosjean*, *supra*, 291 U.S. at 471. *See also e.g.*, *Ambrosini* v. *United States*, *supra*, 187 U.S. 1 (federal stamp tax of 50 cents could not be applied to state liquor bonds).

That the character of the state instrumentality being taxed and the function it is performing are the controlling factors — and not the amount of federal tax imposed — is made clear in *Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 524: "the nature of the governmental agencies . . . may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that *any* taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power" (emphasis supplied). *Accord*, *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 424.

There are strong reasons why these factors have had no bearing on the immunity doctrine. As stated, the historic and consistent purpose of the rule has been to preserve the ability of both state and national governments to perform their "sovereign functions of government" without undue interference from the other. *New York* v. *United States*, 326 U.S. 572, 587 (1946) (opinion of Stone, C.J.). The inquiry recognizes that the idea of sovereignty, at its core, is not susceptible to compromise. Unlike the Court's assessment of the states' role in interstate commerce, balancing burdens and benefits will not do.

Turning to the facts of this case, if the control of the state over its police function is to be preserved in the sense contemplated by the framers,[17] immunity cannot be made to turn on the burden imposed on the state by a federal tax nor the benefit a state might be said to receive from federal grants or federal regulation. These benefits were to have been an intrinsic part of federalism; they cannot now be made conditional on the payment of an otherwise impermissible tax. *Cf. Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).[18]

[17] For example, writing in the *Federalist Papers*, Alexander Hamilton asserted that the federal Constitution was only a "partial union or consolidation," whereby the states retained "all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States." *The Federalist Papers*, 80 (R. Fairfield ed. 1961).

[18] In *Murdock*, the Court held invalid a license tax on solicitation of funds and the sale of merchandise as applied to distribution of religious literature. Answering the argument that the tax was a kind of use tax, the Court said that the "tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution." *Id.* In a similar fashion, the power of the Commonwealth to carry out its sovereign functions is derived solely from the Constitution and not from federal authority. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833, 840-52 (1976).



Moreover, resolution of the question whether a particular type or amount of tax "unduly interferes" with a state's exercise of its sovereign functions would lead the Court into an area where principled standards are virtually nonexistent.[19]

The circuit court in its opinion avoided consideration of these governing criteria and declined to discuss any of this Court's decisions which have considered the tax immunity doctrine. Instead, it reached its novel conclusion that the doctrine has no application to a "user" tax, primarily by reliance on *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973), and cases upholding wharfage and other types of service fees imposed on private carriers using publicly-owned wharves or other transportation facilities. *Massachusetts* v. *United States*, *supra*, 548 F. 2d at 35-6.[20]

[19] *Compare New York* v. *United States*, *supra*, 326 U.S. at 581 (opinion of Frankfurter, J.) ("[a]ny implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges"), *with id.* at 590 (opinion of Stone, C.J.) ("[s]ince all taxes must be laid by general, that is, workable, rules, the effect of [state] immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation"). *See McCulloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 430; *cf. National League of Cities* v. *Usery*, *supra*, 426 U.S. at 850-52 (state's power to determine its employees' wages an "undoubted attribute of state sovereignty" on which the federal exercise of power under the Commerce Clause could not directly impinge; resolution of actual monetary effect of federal legislation found unnecessary).

[20] The court also cited *New York* v. *United States*, *supra*, 326 U.S. 572, and *Head Money Cases*, 112 U.S. 580 (1884), which do not fit

The reliance is misplaced, for the cases cited by the circuit court fail to support its decision.

Turning first to *Texas* v. *United States, supra*, that case concerned the validity of another of the taxes imposed under the Revenue Act — the eight per cent excise tax added to commercial airline tickets. *See* I.R.C. § 2461. Texas claimed that, as applied to state employees traveling

within this category. While the *New York* case does concern the principle of state immunity from federal taxation — specifically, the question whether New York State's sale of its mineral waters as soft drinks was subject to a federal excise tax — no opinion turns or even touches on the type of tax at issue. *See* 326 U.S. at 573 (Frankfurter, J.), 584 (Rutledge, J.), 586 (Stone, C.J.), 590 (Douglas, J.). Nor do the more general views on the scope and limitations of the immunity doctrine expressed by the Justices in that case consider the character of a tax to be a relevant factor; certainly no opinion suggests that a user-oriented tax would *ipso facto* lie outside the reach of the intergovernmental immunity principle.

The *Head Money Cases, supra*, involved a passenger fee, or duty, charged private owners of vessels bringing foreign immigrants into United States ports, and collected into a fund to be used for the benefit of the immigrants. As stated by the Court, the statute was enacted not under the Congressional taxing authority but under its plenary power to regulate foreign commerce and immigration. *Head Money Cases, supra*, 112 U.S. at 591, 595-96. By contrast, as mentioned above, the circuit court never questioned in this case that the aircraft registration tax at issue was enacted under Congress' taxing power (see p. 14, and n. 10, *supra*); its only concern was with the type of tax the registration fee represented. *Massachusetts* v. *United States, supra*, 548 F. 2d at 35-6. Moreover, the plenary nature of Congressional power over interstate commerce must be considered. Independent of all the other distinctions between the *Head Money Cases* and this case, the fact that they involved regulation of foreign commerce renders them inapposite. *See Board of Trustees* v. *United States*, 289 U.S. 48, 56-7 (1933) (reach of the intergovernmental tax immunity principle does not extend to foreclose a duty enacted under Congressional power over foreign commerce); *see also Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824). *Cf. Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976).



on official business, the tax was constitutionally prohibited by the doctrine of intergovernmental tax immunity. The district court rejected the argument, concluding, as quoted by the First Circuit in its decision below, that the excise tax was

> 9. . . . a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity. *New York* v. *United States*, 326 U.S. 572 (1946); *Head Money Cases, supra*; *Packet* v. *Keokuk*, 95 U.S. 80 (1877).
>
> 10. Nothing in the historical basis of dual sovereignty underlying the principle of [redacted] immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. . . . *Texas* v. *United States, supra*, 72-2 U.S. Tax Cas. ¶ 16,048, at p. 86, 131. [11]

[11] The Texas district court first characterized the passenger excise tax as an exercise of the Congressional power over interstate commerce. *Texas* v. *United States, supra*, 72-2 U.S. Tax Cas. at p. 86,131. The First Circuit in the present case made no reference to this portion of the *Texas* opinion. The Texas court also concluded that even if the excise tax were considered as a "tax within the general confines of the doctrine of implied intergovernmental tax immunity" it would still be valid as a nondiscriminatory measure that did not impose an undue burden on the state's exercise of its governmental function. *Texas* v. *United States, supra*, at p. 86,131. Massachusetts agrees that the passenger excise tax, imposed as it is on individual state employees rather than directly on the state or one of its agencies, would appear to be valid under the reasoning of *Helvering* v. *Gerhardt, supra*, 304 U.S. at 420-22, 424. *See City of New York* v. *United States*, 394 F. Supp. 641, 646 (S.D. N.Y. 1975),

The quoted paragraphs from the *Texas* opinion encompass that court's entire treatment of the question whether "airway user charges" are outside the intergovernmental tax immunity doctrine. Given the conclusory nature of this analysis, and the failure of any of the three cases cited by the Texas court to support its conclusion that the tax immunity doctrine was inapplicable,[11] *Texas* v. *United States* cannot be viewed as validating the circuit court's decision here.

Nor is the circuit court's decision any better aided by its strained attempt to analogize the aircraft registration tax to the wharfage or port regulation fees at issue in *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879); and *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877), or the aircraft passenger taxes discussed in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972). The fees in each of these cases were imposed by city ordinance or state agency regulation as a charge for providing wharfage, harbor, or airport service and protection. In each case the sole issue was whether such fees constituted a prohibited duty of tonnage, or, as applied to private concerns doing interstate business, an impermissible burden on interstate commerce. These are wholly separate questions from those implicated by the doctrine of intergovernmental tax immunity. Their resolution in favor of the fees adds

*aff'd per curiam*, 538 F. 2d 308 (2d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976). As is clear by its direct exaction from the state treasury, the same cannot be said for the aircraft registration fee challenged here. Moreover, no consideration was given to the fact that the states or their political subdivisions must match the federal grants under the Development Act. *See* Argument I, *supra*, p. 10.

[11] See pp. 21-22, n. 20, *supra*, for a discussion of *New York* v. *United States* and the *Head Money Cases* in this context. The lack of relevance of *Packet Co.* v. *Keokuk* is examined below, pp. 24-26, *infra*.



nothing to the inquiry whether a federal tax purporting to be user-oriented can be applied constitutionally to a state-owned helicopter used for police work.

With regard to the tonnage cases, see *Clyde Mallory Lines* v. *Alabama*, *supra*; *Vicksburg* v. *Tobin*, *supra*; *Packet Co.* v. *Keokuk*, *supra*; *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), it is clear that they are *sui generis*. Each case posed the question whether a particular municipal wharfage or harbor fee fell within the scope of the constitutional prohibition against a state's laying "any duty of tonnage." United States Constitution, art. 1, § 10, cl. 3. From *Cooley* v. *Board of Wardens* forward, in every case the Court answered by reference to the meaning of a "duty of tonnage" at the time the Constitution was adopted, concluding that the framers as well understood the term to signify something separate from wharfage fees or pilotage charges.[13] Accordingly, since in every case the challenged fees were found to represent compensatory charges for wharfage or port services offered by the local government, they were upheld.[14]

The tonnage cases thus make plain that a "duty of tonnage" is a term of art with a special, historically-defined meaning. As a result of that history, the cases are inapposite; the Court's upholding certain user-oriented fees assessed by local governing bodies against private companies under art. 1, § 10, of the Constitution clearly has no

[13] *See, e.g.*, *Cooley*, *supra*, 53 U.S. (12 How.) at 314; *Packet Co.* v. *Keokuk*, *supra*, 95 U.S. at 85, 87-8; *Clyde Mallory Lines* v. *Alabama*, *supra*, 296 U.S. at 265-66, 267; *see also Huse* v. *Glover*, 119 U.S. 543, 549-50 (1886).

[14] *Cooley* v. *Board of Wardens*, *supra*, 53 U.S. (12 How.) at 314-15; *Packet Co.* v. *Keokuk*, *supra*, 95 U.S. at 88; *Huse* v. *Glover*, *supra*, 119 U.S. at 540-50; *Clyde Mallory Lines* v. *Alabama*, *supra*, 296 U.S. at 267.

bearing on the question whether a federal registration tax on aircraft can be applied to the Commonwealth's police helicopter under the rule of intergovernmental tax immunity.

Similarly, Commerce Clause cases relied on by the circuit court (and the government below) also concern user-oriented taxes or charges imposed by state or local governing bodies on private concerns.[25] In each, the Court upheld the assessment against a challenge that it impermissibly burdened interstate commerce. Again, however, the focus of the Court's analysis was entirely different from that required in the present case.

A state tax on interstate commerce, to be valid, must, in a broad sense, be a user charge: such a tax is permissible only as it represents a nondiscriminatory scheme to compensate the state for the use of its roads or other travel services, and specifically to help defray the state's expenses in providing these services.[26] Thus, in assessing the validity of such a tax, the Court must ask whether it (1) discriminates against those engaged in interstate as compared with the intrastate commerce; (2) reflects a fair approximation of use of the facilities; (3) represents a reasonable, nonexcessive compensation for the services offered; and (4) does

[25] *See, e.g., Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. 707 (use and service charge on all passengers emplaning at a state airport); *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542 (1950) (state tax on common carriers imposed as charge for using state highways); *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 261 (harbor fees charged for mooring and shifting services and for generally policing the port).

[26] *See e.g., Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. at 714; *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 543-44; *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267-68.



not conflict with any federal policies furthering uniform national regulation.[27]

These questions bear no relationship to the inquiry, described above, which application of the intergovernmental tax immunity doctrine requires. Massachusetts does not question either the power of Congress to enact a user-oriented tax as a means of defraying the costs of airport development, or the validity of the airport registration tax itself.[28] Its sole objection is, rather, to the imposition of this tax on a state helicopter used for official police work — *i.e.*, to a specific application of an otherwise valid tax — on the basis that it unduly interferes with the Commonwealth's performance of its fundamental and necessary sovereign duties. Nothing in the Commerce Clause cases cited by the circuit court meets this challenge.[29]

In sum, by declining to consider any of this Court's prior decisions on intergovernmental tax immunity, and by viewing the taxing measure at issue here through the

[27] *Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. at 716-21; *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 544; *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267.

[28] The Commonwealth does dispute, however, the circuit court's determination that the registration tax itself qualifies as a user-oriented tax or "user charge." *See* Argument III, *infra.*

[29] This point is graphically illustrated by comparing the Court's decision in *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267-68, with a more recent governmental tax immunity case, *Mayo* v. *United States, supra,* 319 U.S. at 447-48. In upholding the harbor fees against a challenge under the Commerce Clause in *Clyde Mallory Lines,* the Court stated that the fees were similar to "inspection or license fees incident to or in support of local regulations of interstate commerce," *id.* at 268, which had consistently been approved. Nevertheless, in *Mayo,* the Court held that such fees, while presumably valid as applied to private parties, may not constitutionally be imposed against the federal government under the doctrine of intergovernmental tax immunity.

ill-fitting lens of the Duty on Tonnage and Commerce Clauses, the circuit court fashioned an exception to the tax immunity doctrine wholly without precedent or support. Whether or not the aircraft registration assessment is deemed to be a "user charge" designated to defray the federal cost of airport development, its origin and character plainly identify it as an exercise of Congressional taxing power. *Cf. United States* v. *Sanchez*, 340 U.S. 42, 44-5 (1950); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 393 (1940); *Sonzinsky* v. *United States*, 300 U.S. 506, 513-14 (1937). As such, an asserted imposition of the tax on state property used in performance of traditional police work necessarily raises the question whether the application is prohibited by the implied principle of intergovernmental tax immunity. The circuit court's conclusion that it need not consider this question was erroneous and should be reversed.

## III. Assuming Arguendo that a "User Charge" Falls Outside the Scope of the Tax Immunity Doctrine, the Commonwealth's State Police Helicopter Should Nonetheless be Immune from Taxation Because the Aircraft Registration Tax is Not a "User Charge."

### A. *The Registration Tax Cannot be Classified as a "User Charge" Under the Proper Definition of that Term.*

The circuit court found that its characterization of the aircraft tax as a "user charge" was dispositive of the Commonwealth's claim of immunity, but offered little analytic support for its use of the label. Although the court relied heavily on cases in the commerce and wharfage



fee area, it made no attempt to identify and analyze the separate elements of the taxes in those cases which were deemed to justify the "user charge" classification. Nor did the court analyze whether any of these elements, although pertinent in determining permissible state burdens on shipping or interstate commerce, might be inappropriate in their application to intergovernmental tax immunities.[30] The lack of attention to framework is particularly problematic in this instance, since the court was dealing with a case of first impression for any circuit.[31]

When subjected to analysis, application of the "user charge" sobriquet to the aircraft tax proves open to attack. Although the issue is not free from doubt, it is incumbent upon the Court — in recognition that questions of state sovereignty are at stake here — to resolve those doubts in favor of immunity.

As a starting point, rather than discussing the generally accepted differences between taxes and fees, the court of appeals upheld the use tax largely on the basis of a strained and inappropriate analogy to wharfage fees charged to

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[30] The previous section of this brief presented the argument that the characterization of a tax as a "user charge," in its totality, has no bearing on the issue of state immunity from federal taxation. Here, in contrast, the Commonwealth argues that certain of the discrete elements of "user charges" are inapposite to consideration of the tax immunity principle even assuming the pertinence of the overall user charge concept.

[31] This is so despite the prior decision in *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973), relied on substantially by the circuit court below. The *Texas* case dealt with the application of the tax immunity principle to a different portion of the Revenue Act — the passenger excise taxes set forth in I.R.C. § 4261. Apparently, because both taxes were part of the Revenue Act — although the passenger tax antedated the Act — the circuit court assumed, without analysis, that the taxes were equivalent. As Part I establishes, these taxes are different in origin and application.

vessels using publicly owned wharves. On occasion, this Court has sustained such charges as not coming within the scope of the constitutional prohibition against duties on tonnage. U.S. Const. art. 1, § 10, cl. 3. Such fees have been upheld as charges for the support and maintenance of wharfage facilities justifiably enacted by the owners of such facilities. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879). The fact that the owners of the wharves were public agencies did not deprive them of rights incident to such ownership. "[W]hen compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877).

The aircraft use tax cannot be sustained under the rationale that it is a right of property, rather than an assertion of sovereignty. Section 4491 is a tax on the use of navigable airspace. *See* I.R.C. § 4492(c). The United States is not the proprietor of the navigable airspace. Rather, the United States, through the Federal Aviation Administration, defines and regulates such airspace. 49 U.S.C. §§ 1301(24), 1348 (1970). *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 720-21 (1972). Regulation,[31] however, is not

[31] The designation of the revenue for airport development and expansion does not transform the United States into a proprietor for purposes of analyzing the aircraft use tax. That revenue is distributed in the form of grants to public agencies that do own airports. 49 U.S.C. § 1713. Thus, even when the focus is shifted from the regulation of navigable air space to the ownership of airport facilities, the user fee characterization remains incorrect. The proprietor of the airport is the State or its political subdivision. While the public agency is the possible recipient of financial assistance, that agency must match the federal grant generally to the extent of 50 per cent. 49 U.S.C. § 1717. Thus, in light of the State's own contribution, when its aircraft uses an airport which has received federal funds, it is unfair to suggest that a claim of tax immunity constitutes avoidance of financial responsibilities with respect to federally-assisted improvements. This misconceived consideration appears to have motivated the court of appeals. *Massachusetts* v. *United States*, 548 F. 2d 33, 36 (1st Cir. 1977).



ownership, and the United States should not be permitted to tax Massachusetts' use of its own airport facilities for policing purposes on the assertion that the federal government owns the airways."

On a more general level, it should be noted that the "user charge" label has been applied in the commerce area despite the Court's own recognition that, when treating fees like the aircraft registration tax, not related to actual use, the "user" concept is at best an ill-fitting one. Thus, in the leading case of *Morf* v. *Bingaman*, 298 U.S. 407 (1936), a flat permit fee levied by New Mexico on certain motor vehicles was upheld, but only through modification of a strict "user charge" rationale. Justice Stone wrote:

> We cannot say that these circumstances [highway safety hazards] do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.

[32] *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581 (1874), offers further support that Massachusetts' use of the airspace cannot, of itself, justify the federal tax in wharfage fee terms. The Court held that when an ordinance taxed the use of riverbanks and wharves indiscriminately, rather than the wharves built by the municipality, the exaction could no longer be justified as compensation for use of a wharf; the tax was struck down as a duty on tonnage — a tax prohibited to the states under art. I, § 10 — not a "user charge."

> *As the tax is not on the use of the highways but on the privilege of using them*, without specific limitation as to mileage, the levy of a flat fee . . . rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. 298 U.S. at 411-12 (emphasis added).

The court recognized that the "user" rationale was weakened since the state had made no effort to calibrate the amount of the charge according to degree of use of the highways.

*Morf* has been cited as the justification for all flat and other non-use oriented fees[34] subsequently challenged under the Commerce Clause, but over time the distinction in *Morf* between "privilege of use" charges and "user" charges has been obscured. *E.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544-45 (1950). This lack of precision in the commerce area, while explainable in its own context, is wholly inappropriate in the immunity area.

For interstate commerce purposes the "user" concept has traditionally served as a means of distinguishing permissible state charges levied on both intra- and interstate entities from invalid taxes on interstate entities alone. *Compare Hendrick* v. *Maryland*, 235 U.S. 610, 624 (1915), *with Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867). So

[34] *See, e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950) (flat tax on all common carriers); *see also Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-17 (1972) (airport fee for each passenger emplaning on any commercial aircraft); *Duckworth* v. *Arkansas*, 314 U.S. 390, 395 (1941) (fee for transportation of intoxicating beverages across state); *Dixie Ohio Express Co.* v. *State Revenue Comm'n*, 306 U.S. 72, 76 (1939) (tax upon trucks and trailers used for hire).



long as the overall charge was not excessive, there was less need for close analysis of the "user" concept, and questions of a fair degree of congruence between charge and benefit were subordinated to the observation that, however ill-fitting the "user" definition, interstate commerce entities could not claim that their burden was disproportionate to intrastate entities. *See State Tax Comm'n* v. *Aldrich*, 316 U.S. 174, 182 (1942) (Frankfurter, J., concurring) (the limit on the state tax power imposed by Art. I, § 8, cl. 3, is that "no state tax so as to discriminate against interstate commerce"); *see also Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 714, 717 (1972); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495, 501-05 (1947); *cf. Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544-45 (1950).

In the tax immunity area, the inappropriateness of these "rough approximations," *Capitol Greyhound Lines* v. *Brice*, *supra*, 339 U.S. at 546, as opposed to some more precise degree of calibration, should be plain. Fundamentally at issue in the tax area is the power of one level of government to control or suppress, through fiscal coercion, another government's full exercise of its sovereign powers. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Federal fees based upon "privilege of use"[35] — entry fees

[35] The legislative history of the aircraft registration tax shows that it was intended to be "an entry fee to use the [air] system," H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3085, (hereinafter cited as House Report) establishing its nature as a "privilege to use" levy in the view of Congress, rather than a "user charge." While the Court should not defer to Congress in determining whether its attempt to tax the state is constitutional, the Court may accept the definitional limits on the "user" concept that Congress itself intended to prescribe. *Compare Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 314 (1851) ("it is the thing, and not the name, which is to be considered") *with Trafficante* v. *Metropolitan Life Ins.*

unrelated to actual use — must not be permitted to apply to states, lest the federal government, through imposition of a tax, presume to exercise control over Massachusetts' ability to carry on effective law enforcement.[36] Hence, as in other areas where basic values demand special solicitude,[37] a closer scrutiny should be given the justification offered by the government for its taxing measure. When such scrutiny is afforded it becomes clear that the aircraft registration tax is precisely what its name states it to be — a tax — and cannot fairly be characterized as a user charge.

This Court has coined a standard definition for a tax. It is "an 'enforced contribution to provide for the support of government.'" *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975), *quoting United States* v. *LaFranca*, 282 U.S. 568, 572 (1931). The special regulatory or beneficent effects that may accompany the tax, and which may have impelled the Congress to act, do not in any way change its status as a proper revenue-raising exercise of the taxing power under art. I, § 8, cl. 1, of the Constitution. *United States* v. *Sanchez*, 340 U.S. 42, 42, 44-5 (1950); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 393 (1940); *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). *See also National Cable Television Association* v. *United States*, 415 U.S. 336, 341 (1974).

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*Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring) (Congress' classification of those entitled to sue entitled to weight in court's standing analysis under Article III).

[36] A sanction available to the United States for failure to pay the registration tax is seizure of the State Police helicopter. I.R.C. § 6331(b).

[37] *See e.g.*, *Murdock* v. *Pennsylvania*, *supra*, 319 U.S. at 115:

> A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike.



By contrast, a user charge, when imposed by the federal government, has been characterized as a reasonable charge made to a recipient for a "measurable unit or amount of Government service or property from which he derives a special benefit." *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345, 349 (1974).[38] As opposed to a tax which need establish no relation between payment and benefit, it is "the value to the recipient" which appropriately guides the measure of a user fee. *National Cable Television Association* v. *United States*, *supra*, 415 U.S. at 342-43.[39]

If these definitions are applied to this case, it is plain that the aircraft registration tax, unlike, perhaps, other elements of the Revenue Act,[40] must be considered a general tax and not a "user charge." The registration tax establishes a flat rate of twenty-five dollars per aircraft, plus additional levies

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[38] The Court was here quoting a circular issued in 1959 by the Bureau of Budget (now known as the Office of Management and Budget) describing a section of the Natural Gas Act, 31 U.S.C. § 483a, which the Court held to authorize a user fee but not the imposition of a flat "tax" uncorrelated to amount of actual use.

[39] Both the *National Cable* and *New England Power* cases concerned the power of federal agencies — the F.C.C. and F.P.C. — to impose levies under their regulatory statutes. The F.C.C. had imposed, *inter alia*, annual fees for each CATV system at the rate of 30 cents per subscriber. The F.P.C. imposed assessments on electric and gas companies based on their sales and deliveries, despite the statute's authorization of charges to recipients of energy service. The Court was concerned that the taxing power of Congress not be derogated by loose delegations of the taxing power to agencies. The court accordingly proceeded to read the two statutes as permitting only charges measured by benefits received.

[40] *See* I.R.C. §§ 4041(c) (tax on aviation fuel); 4261 (passenger tax); 4271 (transportation of property by air). These exactions are user-oriented in that they are imposed only when actually using the airport and airway system. Moreover, the amount of the exaction increases with more extensive use. *But see infra*, Part III B (suggesting that none of these taxes are user-oriented).

based on weight.[41] The exaction does not bear any relation to the degree of use than an aircraft may make of the nation's air system.[42]

The definitions of "user charge" employed by the Court in *National Cable*, *supra*, and *New England Power Co.*, *supra*, are stricter than those employed, for example, in *Clyde Malloy Lines* v. *Alabama*, 296 U.S. 261, 265-66 (1935), and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.* 405 U.S. 707 (1972), cited for support by the circuit court. Neither set of definitions has ever been considered or actually employed in the tax immunity area. This Court, if it accepts the "user charge" concept as a new dimension to the immunity doctrine, must therefore choose the definition and analysis of the term best suited to the tax immunity area.

The stricter standards articulated in *National Cable* and *New England Power Co.* are the more appropriate, because here, as with the levy of fees by the F.C.C. and F.P.C. in those cases, the essential dispute involves a direct clash between organs of government, with the resolution of the case bearing upon the prerogatives of both organs, diminishing the power of one as it increases that of the

[41] While Congress did note that heavier planes may require more extensive use of the air traffic control system, it made no attempt to coordinate its charges with the frequency with which such planes may use the system. House Report, *supra*, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085, 3093. Moreover, the tax by weight was geared primarily to commercial carriers, with the justification that there would be a direct relation between the weight of the plane and the revenue it produced for the taxpayer. *Id.* at 3093.

[42] Moreover, the benefits realized through use of the monies collected under I.R.C. § 4491 are not limited to those who pay the tax. The revenues are channelled to the Airport and Airway Trust Fund. 49 U.S.C. § 1742. While the Trust Fund is intended to insure that all the excise taxes established under the Revenue Act are generally used for



other. In *National Cable* and *New England Power Co.*, the limitation on the federal agencies' authority to impose charges under their respective statutes was deemed necessary, *inter alia*, to prevent dilution of the basic constitutional precept that the legislative branch alone may levy taxes. The fundamental questions of power allocation at issue in the cases justified giving close scrutiny. *See National Cable Television Association* v. *United States*, *supra*, 415 U.S. at 341-42. *Cf. Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

Similarly, in this case, a strict view of the "user charge" label is necessary to prevent subordination of essential state functions to the federal taxing power.

In the interstate commerce area, the "user charge" cases implicated no such basic issues. It was beyond dispute that if at any time the Congress chose to override state levies on interstate commerce, either replacing or simply prohibiting them, it could do so under art. I, § 8, cl. 3, of the Constitution. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 187-97 (1824); *see Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines Inc.*, *supra*, 405 U.S. at 721; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); *Capitol Greyhound Lines* v. *Brice*, *supra*, 339 U.S. at 547.

For these reasons the definitions of "user charges" adopted in *National Cable* and *New England Power Co.* should be applied here, and the circuit court's "user charge" rationale should be rejected, on its own terms, as inapplicable.

"expansion, improvement and maintenance of the air transportation system," House Report, *supra*, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085, there is again no direct link made between the use of that system and payment of the tax. In addition, in enacting the Development and Revenue Acts, Congress was aware that the benefits of an expanded air transportation system would be enjoyed by many air system users who were not taxed (for example, the military), as well as citizens generally, regardless of whether they flew. *See id.* at 3049-50, 3051, 3052-53.

B. *The Secretary of Transportation, Charged by Congress with Reviewing the Provisions of the Revenue Act, has Rejected the "User" Characterization of the Aircraft Registration Tax as Unsound.*

In separate provisions in the Department and Revenue Acts, the Congress directed the Secretary of Transportation to study and report on the costs of the airport and airway system, and the appropriate allocation of these costs to ensure equitable distribution of the tax burden.[43]

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[43] Section 4 of the Development Act, 49 U.S.C. § 1703 (1970), provides in part:

> *Cost Allocation Study.* — The Secretary of Transportation shall conduct a study respecting the appropriate method for allocating the cost of the airport and airway system among the various users . . ..

Section 209 of the Revenue Act, Pub. L. No. 91-258, Tit. II, § 209, 84 Stat. 252, provides:

> (a) STUDY AND INVESTIGATION. — The Secretary of Transportation is hereby authorized and directed . . . to make a study and investigation to make available to the Congress information on the basis of which it may determine what revisions, if any, of the taxes imposed by the United States should be made in order to assure, insofar as practicable, an equitable distribution of the tax burden among the various classes of persons using the airports and airways of the United States or otherwise deriving benefits from such airports and airways.
>
> (b) REPORTS. — The Secretary of Transportation shall report to the Congress the results of the study and investigation required by subsection (a). The final report shall be made as soon as possible . . .. Each such report shall be printed as a House document of the session of the Congress to which the report is made. In addition, the Secretary of Transportation shall identify the costs to the Federal Government that should appropriately be charged to the system and the value to be appropriately assigned to the general public benefit.



The Secretary filed the first part of the study in September, 1973.[44] It has special status among executive studies; since it is the product of a Congressional mandate, its empirical findings and conclusions deserve special weight, if relevant, in this Court's deliberations on issues which can be illuminated by empirical data. *Cf.* Chesapeake & Delaware Canal Company v. *United States*, 250 U.S. 123, 128-29 (1919).

The Study begins by stating that the taxes called for by the Revenue Act were, together, "recognized as only an interim approach to an overall user charge system." Study, *supra*, at 11. Thus the Secretary's Study was an effort to extract from experience under the Act the basis for a sounder user-related revenue system. *Id.* As far as the weight and registration taxes combined in I.R.C. § 4491 were concerned, the Secretary concluded that "[t]hese taxes are unrelated to the amount of use of the system." *Id.* at 58 (as applied to noncommercial aviation); 57 (as applied to commercial carriers). Indeed, the Secretary criticized all the "user taxes" imposed under the Revenue Act[45] because

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[44] Its title is Airport and Airway Cost Allocation Study, Part I: Determination, Allocation, and Recovery of System Costs (U.S. Department of Transportation, Sept. 1973) (hereafter cited as "Study"). By its terms, the Study responds to the mandates of both § 4 of the Development Act and § 209 of the Revenue Act. *See* Study at 12. Agency studies such as this have been judicially noticed by this Court. *E.g.*, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 332, n. 12 (1961).

[45] His criticism was directed also at the aircraft tire and tube sales taxes which antedated the 1970 Development and Revenue Acts. *See* I.R.C. § 4071.

they did "not adequately relate to system usage," *id.* at 56, and proposed that, in moving to a more permanent system, the existing structure should be changed so "that the charges paid by each individual user [would] be tied to the usage he imposes on the system and to the costs incurred on his behalf." *Id.*; *see id.* at 57-9 for potential "user fees"[46] that would effect a closer tie between levy and user.

The segment of the air system where the greatest divergence was found to occur between tax levy and amount of use is "general aviation" (noncommercial and nonmilitary aircraft) in which the State Police helicopter falls.[47] Study, *supra*, at 31-2, 43-50. In this category none of the taxes under the Act can truly be termed user charges, and the registration tax, since it is in no way related to amount of use of the aircraft or the air facilities financed with federal funds, is the most inequitable of the taxes now a part of the Act.

Thus, unless the "user fee" concept is to become a self-serving label planted by Congress in legislative history to override state sovereignty, the lack of factual foundation for applying the term to a particular tax must be addressed

[46] It is noteworthy that the Secretary characterized the levies established by the Revenue Act as "excise taxes," explicitly contrasting them to properly designed "user fees," which he believed would constitute a more equitable and efficient tax structure. Study, *supra*, at 60 and n. 1.

[47] "General aviation is a heterogeneous group. It covers a broad range of users, from the simplest 'homebuilts' to large turbine aircraft as sophisticated as any in the air turbine fleet. . . . Clearly, a general aviation pilot flying 'off the system' should not pay the same user charges as a general aviation pilot flying an identical aircraft on instruments in controlled (and costly) terminal air space. . . . [T]he present tax structure leads neither to an equitable distribution of the cost burden among the various users of the system nor to the needed incentives to use the system efficiently." Study, *supra*, at 49.



by the federal courts.[48] Such an inquiry compels a fact-gathering process. *See National Cable Television Association* v. *United States*, *supra*, 415 U.S. at 343-44. In adopting the user-fee concept, however, the circuit court chose not to look behind the label offered by the United States, and upheld the district court's allowance of its motion to dismiss. If this Court were to accept the "user charge" rationale, at a minimum, the circuit court should be reversed and the case remanded for trial on the question whether the registration tax is in fact user-related.

## IV. Contrary to the Argument of the United States in the Lower Courts, the Principle of Intergovernmental Tax Immunity Remains Alive and Well.

The Commonwealth's prior arguments have sought to clear the field of newly asserted exceptions to the tax immunity doctrine. Once that task is completed, it remains to address the doctrine itself and its application to this case. In the proceedings below the United States took the position that the "theory of intergovernmental tax immunity . . . is for all practical purposes moribund if not obsolete[,] . . . a 'doctrine of questionable validity . . . .'" *Massachusetts* v. *United States*, 548 F. 2d 33, 34-5 (1st Cir. 1977). A review of the doctrine's development and recent treatment by the Court reveals, however, that the immunity principle never lost its essential vitality. When applied to this case, it precludes imposition of the aircraft registration tax.

The Constitution of the United States does not expressly provide for immunity from taxation. The national government is not specifically precluded from taxing the states, nor are the states, in terms, prohibited from taxing the national government. There has nevertheless persisted a continuous

[48] In Argument II, p. 21, and n. 19, *supra*, the Commonwealth has argued that the lack of manageable standards renders the user concept as a whole an unworthy addition to the tax immunity area.

judicial recognition that limitations on the taxing powers of each arise by necessary implication from the essential premises of the Constitution.[49]

The seminal opinion on the principal of intergovernmental tax immunity is *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which held that the operation of the national bank chartered by Congress was immune from taxation by the State of Maryland. Since the power to operate a national bank was within the scope of the enumerated powers delegated to the national government under the Constitution, a tax on such operation was held to infringe upon the sovereignty of the United States. This infringement was determined not by the amount of the tax but by the status of the central government under the Constitution. Speaking for the Court, Chief Justice Marshall stated:

[49] In regard to the specific problem of the federal taxing power, Hamilton declared that:

> Revenue is as requisite to the purposes of the local administrations, as to those of the union; and the former are at least of equal importance with the latter, to the happiness of the people. It is therefore as necessary, that the state governments should be able to command the means of supplying their wants, as, that the national government should possess the like faculty, in respect to the wants of the union. But an indefinite power of taxation in the *latter* might, and probably would, in time, deprive the *former* of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. (Emphasis in original.)

*The Federalist Papers*, 78 (R. Fairfield ed. 1961).



> We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. *McCulloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 430.

The constitutional principle of tax immunity was thus placed on a firm foundation.

The sovereign status of the individual states also provided the rationale for extending to them the principle of intergovernmental tax immunity. In *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1870), the Court held that Congress could not tax the salary of a state judicial officer. Noting that the central government is one of enumerated powers under the Constitution, the Court emphasized the states' retention of all other powers under the Tenth Amendment. The sovereignty of the states was thus a constitutional datum which warranted immunity from taxation, and the existence of dual sovereignties in the states and the central government under the Constitution made the immunity reciprocal:

> In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation: as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. *Collector* v. *Day*, *supra*, 78 U.S. (11 Wall.) at 127.

The numerous decisions in which claims of immunity have been adjudicated over more than a century reveal strong unifying themes in the evolution of the principle of intergovernmental tax immunity. The first and most important feature is that the fundamental concept of dual sovereignty has been uniformly recognized, from its earliest statement to the more recent cases reassessing the reach of the immunity doctrine. A representative judicial statement appears in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931):

> It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. . . .

*See also*: *Helvering* v. *Gerhardt*, 304 U.S. at 411; *Willcuts* v. *Bunn*, 282 U.S. at 224-25. At its core, then, the doctrine of intergovernmental tax immunity recognizes the necessity of protecting the freedom of both the states and central government to carry on their sovereign, governmental powers unimpaired by the other's conflicting exertions of taxing authority.

The difficulty with the principle has not been with this conceptual basis but with its application to particular circumstances; there are a wide variety of contexts in which the power to tax has resolved itself into a dispute between the central government and the states. In some instances, the results reached by the Court have stood the test of time. But in others, the Court has reversed prior cases, attempting to maintain the basic integrity of the tax immunity principle without seeing it used in such a way as to limit unduly the revenue-raising capacities of the federal government.[50]



These related developments occurred simultaneously and for the most part interchangeably with respect to both federal and state immunity. In the years following the establishment of the doctrine's reciprocal nature, the Court took a broad view of the immunity principle, and struck down a wide variety of state taxes under its guise. *E.g.*, *Gillespie* v. *Oklahoma*, 257 U.S. 501, 504-07 (1922) (state tax on income derived from lease of Indian lands); *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 222 (1928) (sales tax on gasoline dealer measured by volume sold to United States); *Graves* v. *Texas Co.*, 298 U.S. 393, 400-01 (1936) (gasoline storage tax on distributor measured by volume withdrawn upon sales to the United States); *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401, 408 (1937) (state income tax on salaries of federal employees); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 583 (1895) (federal tax on income from municipal bonds); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 400-01 (1932) (federal tax on income from lessor of state lands).

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[50] This basic rationale of dual sovereignty was not in any manner questioned when the Court later overruled the specific application of tax immunity in *Collector* v. *Day*, finding that salaries of state employees were subject to federal taxation. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939).

This expansive view of the principle of intergovernmental tax immunity was of relatively brief duration. As a clearer understanding of the interaction between the governments and those with whom it did business developed, the principle took on a more realistic cast. In *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941), the Court overruled prior precedent and held that the mere passing on of an economic burden to the government did not vitiate an otherwise nondiscriminatory tax. This ancillary principle also defeated a series of claims by contractors seeking tax immunity because of their business relations with the government. *E.g.*, *United States* v. *City of Detroit*, 355 U.S. 466, 475 (1958); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 161 (1937); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 526 (1926).

The immunity of government employees from income taxes also was abandoned. In *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), the Court sustained a federal income tax on employees of the New York Port Authority. Among the reasons stated by the Court was that there, as in the converse situation of state taxation, the economic incidence of the tax on the government was immaterial. "The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity." *Helvering* v. *Gerhardt*, *supra*, at 422. The logic of that opinion was later applied to uphold a state income tax on the salary of a federal employee. *Graves* v. *New York ex. rel. O'Keefe*, 306 U.S. 466, 487 (1939). These and like decisions provided a salutary limitation to the principle of intergovernmental tax immunity. On the one hand, vicarious immunity could not be claimed on the basis of economic incidence on the



government. *See Gurley* v. *Rhoden*, 421 U.S. 200, 204 (1975). On the other hand, the basic sovereignty of the government, whether central or state, was preserved as a positive constitutional value. The "decisions consistently prohibit taxes levied on the property or purchases of the Government itself." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 123 (1954) (footnote omitted).

A separate restriction imposed on the principle of state immunity from federal taxation relates to the nature of the activity engaged in by the state and which is subject to taxation. In *Helvering* v. *Powers*, 293 U.S. 214 (1934), the Court upheld imposition of federal income taxes on the state-appointed trustees of a publicly operated street railway. With respect to the claim of immunity, the Court stated:

> The principle of immunity thus has inherent limitations . . . [a]nd one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. . . . The necessary protection of the independence of the state government is not deemed to go so far. 293 U.S. at 225.[51]

[51] The rejection of immunity in the *Powers* case is one example in a long line of decisions where the Court has declined to interfere with the application of federal taxing power to instances where the state was not engaging in an essential sovereign function. *See e.g.*, *Allen* v. *Regents*, 304 U.S. 439, 452 (1938) (federal admissions tax on tickets to university

By 1938, the principle of intergovernmental tax immunity had undergone a refinement process which enabled the Court to delineate the contours of state immunity:

> [J]udicial pronouncements . . . definitely establish . . . two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which may well be substantially or entirely absorbed by private persons. *Helvering* v. *Gerhardt*, 304 U.S. 405, 419-20 (1938).

Immunity was thus firmly predicated on the performance of a sovereign function and imposition of the tax on the state itself. *See generally*, Powell, *The Remnant of Inter-*

athletic contests); *Ohio* v. *Helvering*, 292 U.S. 360, 368 (1934) (excise tax on sellers of state-owned liquor); *South Carolina* v. *United States*, 199 U.S. 437, 461 (1905) (license tax on sellers of state-owned liquor).



*governmental Tax Immunities*, 58 Harv. L. Rev. 757 (1945). The basic tenet of dual sovereignty underlying the principle of intergovernmental tax immunity was maintained; indeed, the narrowing process may be said to have fortified the immunity principle, by avoiding the extravagance which, in the end, might have rendered it functionally untenable.

The delicate balance described in *Gerhardt* was jarred if not upset in the case of *New York* v. *United States*, 326 U.S. 572 (1946). The facts of the case did not require a reevaluation of the principle of immunity. The logic of sustaining a tax on the sale of mineral water by the state was plainly governed by prior decisions. *Ohio* v. *Helvering*, *supra*, 300 U.S. at 371, *South Carolina* v. *United States*, *supra*, 199 U.S. at 463. As Justice Frankfurter stated, in light of prior cases upholding taxes on the sale of liquor by a state, there was "no reason for putting soft drinks in a different constitutional category from hard drinks." *New York* v. *United States*, 326 U.S. at 575 (opinion of Frankfurter, J.). The difficulty arose when Justice Frankfurter attempted to go beyond the facts of the case, stating; "[T]here comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases." 326 U.S. at 575. After a review of the state immunity principle, he concluded that there is "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." 326 U.S. at 584. Only Justice Rutledge of the eight-member Court[*] joined in that opinion. Chief Justice Stone,

[*] Justice Jackson did not participate in the decision. The opinion of Justice Frankfurter leads off in the United States Reports, despite its minority status, because he was given the assignment of announcing the judgment of the Court.

speaking for four members of the Court, filed a separate opinion. The split among the majority occurred because these four members, as was of course true of the two dissenters, were "not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike." 326 U.S. at 586.[33] Chief Justice Stone expressed concern that a non-discriminatory tax may "when laid on a State, . . . nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government." 326 U.S. at 587. The Chief Justice thus focused on the essential element of dual sovereignty which had given rise to and sustained the principle of intergovernmental tax immunity. The nondiscriminatory nature of a tax was not, in his view, sufficient; a tax on the state was invalid "not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U.S. at 587. This rationale was a precise reflection of the Court's prior opinions on tax immunity. *See, e.g., Helvering* v. *Gerhardt, supra,* 304 U.S. at 414; *Graves* v. *New York ex rel. O'Keefe, supra,* 306 U.S. at 477-78.

While speaking in terms of a new formulation, the separate opinion of Justice Frankfurter is itself grounded on state sovereignty. He, too, recognized that the Congressional power to lay taxes did not dispose of the immunity issue: "[b]ut the fact that ours is a federal constitutional

[33] The four Justices in the plurality and two in dissent thus constituted a majority on the issue of the doctrine's continued vitality. *Cf. Arnett* v. *Kennedy,* 416 U.S. 134 (1974) (concurring and dissenting opinions form a majority of six holding that the issue of what process is "due process" finds its source exclusively in the Fourteenth Amendment).



system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government." *New York* v. *United States, supra,* 326 U.S. at 575. One of these implications is a limited degree of tax immunity. He stated:

> There are, of course, state activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. [34] These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. 326 U.S. at 582.

This analysis reveals a basic acceptance of the concept of dual sovereignty, tempered by a federalist's concern for the unimpeded exercise of the Congressional taxing power. Even for Justice Frankfurter, the principal goal was that income earned by the state be available for federal taxation. 326 U.S. at 579. The split among the Justices can be traced to the narrow issue as to the tax treatment of revenue-creating activity by the state. The court would presumably have agreed that the levying and imposition of taxes by the states was immune from federal taxation.[35]

[34] And only a state can own a state police helicopter.

[35] *See,* Tucker and Rombro, *State Immunity From Federal Taxation: The Need for Re-examination,* 43 Geo. Wash. L. Rev. 501, 550 (1975).

However, the separate issues raised by the state engaging in other revenue-making areas do not in any way undermine the common rubric that the state may not be taxed when it is earning no income, but is carrying on the unique "business" of law enforcement.

The most recent statement of this Court on the issue of state immunity is found in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). While that case dealt with the power of Congress to regulate the activity of the state pursuant to the Commerce Clause, it bears unequivocal implications for the tax immunity issue. In striking down the application of the Fair Labor Standards Act to state and local employees generally, the Court acknowledged the continued validity of the principle of intergovernmental tax immunity and relied upon concepts of state sovereignty which transcend differences between commerce regulation and the taxing power. *Compare* Part II, *supra*.

With respect to the issue of tax immunity, the Court quoted directly from the opinion of Chief Justice Stone in *New York* v. *United States*, in which the notion of nondiscrimination as a basis for overriding state sovereignty was rejected. 426 U.S. at 843. This reference not only placed the *Usery* Court's stamp of approval on the four-member concurrence in *New York* v. *United States* but demonstrated that the principle of state immunity was no "aberration" in the continuum of constitutional history. *Contrast City of New York* v. *United States*, 394 F. Supp. 641, 644 (S.D. N.Y. 1975), *aff'd per curiam*, 538 F. 2d 308 (2d Cir.), *cert. denied*, 429 U.S. 825 (1976). The fact that the principle was implied from, rather than expressly stated in, the Constitution did not defeat its efficacy. "[T]his 'immunity' is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority." *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843-44, n. 14.



The Court's Commerce Clause analysis directly supports the tax immunity claim of the Commonwealth. There, as here, the sovereignty of the states provides the underlying principle of decision. The Court referred to the "essential role of the States in our federal system of government," and stated that "[w]e have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . .." *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 844-45. The barrier imposed by sovereignty was measured, not by "particularized assessments of actual impact," 426 U.S. at 851, but by the state's power to structure its own governmental operations. The wage and hour provisions of the federal act could not be permitted to override the sovereignty of the states in that regard. 426 U.S. at 852.

In arriving at this decision, the Court overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), upholding application of the Fair Labor Standards Act to state schools and hospitals. The Court also disavowed language in *United States* v. *California*, 297 U.S. 175 (1936), which indicated that the principle of intergovernmental tax immunity had no analogy in the Commerce Clause area. That dictum was described as "simply wrong." *National League of Cities* v. *Usery*, *supra*. 426 U.S. at 855. Thus, the Court was of the firm conviction that state sovereignty was a constitutional value requiring judicial protection. It is significant that this position has consistently been recognized in the taxing area. *New York* v. *United States*, 326 U.S. 572, 575 (1946); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931). Its affirmation in the commerce area underscores the basic integrity of the constitutional foundation of state sovereignty.

The principle of intergovernmental tax immunity, as presently formulated, thus has an obvious application to the aircraft use tax imposed on the Commonwealth. The legal

incidence is on the state. The activity taxed is the performance of a sovereign function of protecting the public safety. The Commonwealth has not generated revenue from its use of the helicopter; there is thus no interference with the federal power to tax. The sovereignty of the Commonwealth demands that the application of the aircraft use tax to the Commonwealth's state police helicopter be enjoined.

## Conclusion

For the reasons set forth above, the decision of the circuit court, affirming the district court's dismissal of the Commonwealth's complaint, should be reversed and the case remanded for further action consistent with the Court's opinion.

Respectfully submitted,

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